

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

December 12, 2005

Eric G. Mooney, Esquire
11 South Race Street
Georgetown, DE 19947

James W. Adkins, Esquire
Department of Justice
114 E. Market Street, #201
Georgetown, DE19947

**RE: Jason E. Armiger - Expungement Action
Civil Action No. 05X-07-004**

Dear Counsel:

A decision was originally released on 11/23/05. It was withdrawn on November 30, 2005, to further consider the decision of *Ryan v. State*, Del.Supr., 791 A.2d 742 (2002)

Mr. Armiger has filed a Petition for Expungement seeking an Order of Expungement for a motor vehicle offense (21 *Del. C.* §2753). That section makes it unlawful to cause or knowingly permit a minor to drive a motor vehicle without a license. It is punishable by a fine for the first offense of up to \$115.00, and for any subsequent offense, a fine up to \$230.00 and imprisonment up to thirty (30) days. The offense occurred on February 19, 2005. The Defendant was sentenced to Probation Before Judgment and satisfactorily completed his probation on May 10, 2005. In July, 2005, he filed the present Petition.

The State opposes the present application for two reasons. First, the State alleges that a Title 21 offense should not be expunged under the Title 11 statute. Second, the State argues that the Petitioner has not established manifest injustice, a requirement for expungement.

DOES SUPERIOR COURT HAVE JURISDICTION?

Admittedly, the decisions of this Court have been divided on the issue of jurisdiction. Some judges have ruled that a "motor vehicle offense is not the type of offense that falls within the expungement statute". Some judges have ruled that it is basically within the inherent authority of Superior Court to resolve these cases because Superior Court has been granted jurisdiction by the legislature in 11 *Del. C.* §4372 to hear expungement applications.

I find that based on Title 11 and Title 21, Superior Court does have jurisdiction to expunge Title 21 offenses. It is my hope that the State will appeal this ruling so there can be a final decision as to our differences of opinion.

The expungement statute is found in Title 11, §4371. The policy set forth in §4371 states that innocent persons should be able to expunge arrest records “which may occur as a result of arrest and other criminal proceedings which are unfounded or unproven”. Thus the statute notes there may be an arrest and there may be other criminal proceedings.

The Motor Vehicle Code is found in Title 21. At 21 *Del. C.* §701, police officers have the authority “to make arrest for violation[s] of the motor vehicle and traffic law of this State”.

Title 11 also defines a crime or an offense broadly. In 11 *Del. C.* 233(a), a crime or offense is any act which is forbidden by a statute of this State, even if it is punishable by only a fine. It is not limited to Title 11 statutes but any statute. Therefore, since Title 21 contains statutory offenses, they would be included in this definition.

The expungement statute permits the removal of unfounded or unproven charges based upon an arrest. There is nothing in the expungement statute which limits it to Title 11 offenses. This makes sense as people are arrested under Title 16 offenses and people are arrested for felony offenses under Title 21. The State argues that this is a minor traffic offense and should not, therefore, be subject to being able to be expunged under Title 11. But, as noted, the statute is centered on arrest.

Therefore, for the foregoing reasons, I find that this Court has jurisdiction to expunge a motor vehicle offense.

MANIFEST INJUSTICE

The State's second argument is that the petitioner has not established that there is unwarranted damage or manifest injustice to the petitioner by continuing to have this probation before judgment disposition on his record. Petitioner argues that he does not have to establish an existing injustice or prejudice because the statute includes “may cause” language which looks to the future. I find that the continued requirement to report this arrest, unless expunged, to meet the requirement of “may cause manifest injustice”.

FOP'S AND PBJ'S

It has been previously ruled by this Court that a person should not be able to receive an expungement of a first offender's program (FOP) because in those circumstances, the individual acknowledges guilt and then completes a program of rehabilitation and education. If he is successful, then the charges are dismissed with a disposition noting the successful completion of the First Offender's Program. If such matters could be expunged, then it obviously may result in the injustice of multiple bites out of the first offender apple. See Judge Cooch's decision in *Truluck v. State*, 2004 WL 3354224 (Del. Super.).

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Probation before judgment is in a similar category, but it is different. Probation before judgment is a procedural vehicle which allows acknowledgment of guilt, but with a stay of the entry of guilt to allow for the Defendant to complete education, rehabilitation, or other conditions required by the sentencing judge. If Defendant is successful, then the person is discharged from his or her probation without an adjudication of guilt. The Supreme Court has determined that a probation before judgment adjudication is expungable. *Ryan v. State*, Del.Supr., 791 A.2d 742 (2002)

Originally I was concerned that because 11 Del.C. §4218(d) only allows one probation before judgment every five years, then the probation before judgement record should remain intact until the expiration of five years.

This would provide notice to the Courts. But in footnote 1 of *Ryan v. State*, the Supreme Court states that an applicant need not wait five years, as the statute does not impose such a limitation. My concerns are addressed in 11 Del.C. 4373(c) and 4374, which allow law enforcement agencies to have continued access to expunged records. In other words, no record is completely expunged , as the supervisor of the State Bureau of Identification retains control of the file for the limited purposes contained in the aforementioned expungement statutes.

The expungement petition is granted.

As aforementioned, as to the jurisdictional matters, this needs to be resolved once and for all, and I ask that this issue be resolved at the Supreme Court to avoid the headaches of these split decisions in Superior Court. The State agencies need to get a definitive answer.

Thank you.

Yours very truly,

T. Henley Graves

THG/jfg
cc: Prothonotary

bcc: Judge Jerome O. Herlihy
Judge Susan C. DelPesco
Judge John E. Babiarez, Jr.
Judge Joseph R. Slights, III
Judge Richard R. Stokes
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